In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 221

WALTER J. HICKEL, SECRETARY OF THE INTERIOR, PETITIONER

v.

THE OIL SHALE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO THE BRIEF IN OPPOSITION

1. The judgments of the United States Court of Appeals for the Tenth Circuit in the appeals taken to that court by the United States against respondents Umpleby, *et al.*, Napier, *et al.*, and Brown, *et al.*, are set out in Appendices A, B, and C, respectively, *infra*. They were omitted by inadvertence from the petition. All three, together with the judgment in *United States v. The Oil Shale Corporation, et al.*, were certified to this Court as part of the original record now on file with the Clerk. All four appeals were treated as one in the opinion of the court below, and the body of the petition makes plain that our intention was to seek review of that decision—that is, of all four judg-

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ments—although only one judgment was reproduced. There is indeed no basis on which the government could or would have selected only one judgment for review. In all these circumstances, we believe it is sufficiently clear that the government sought review of all the judgments concerned within the time permitted by statute, 28 U.S.C. 2101(c), despite its failure fully to comply with this Court's rules. We regret, however, both our error and any inconvenience it may have caused.

2. Respondents The Oil Shale Corporation *et al.* and Brown *et al.* correctly note that the only issues before this Court are whether its prior opinion in *Ickes* v. *Development Corp.* (*Virginia-Colorado*), 295 U.S. 639, necessarily forbids the Secretary to rely upon his prior cancellation of the present claims and, if so, whether that decision should be reexamined. Whether, absent such compulsion, the history of administrative action after the *Virginia-Colorado* decision forecloses the Secretary from now treating the cancellations as other than void is a separate issue, inappropriate for decision at this time. If this Court should grant certiorari and decide the issue presented in the government's favor, however, we believe we would then be entitled to assert that the questions, how extensive had been the prior administrative acquiescence in *Virginia-Colorado,* and what was its effect on the Secretary's present ability to rely on the cancellations, are matters which ought first to be decided by the Secretary himself and that, he having done so, the appropriate record on which to assess his judgment is the

record made before him, not the record which was sought to be made in district court. *Cf. United States v. Carlo Bianchi & Co.*, 373 U.S. 709.

Although the issues before the Court are thus limited and will not terminate this litigation however resolved, they are nonetheless of major significance for the disposition and rational exploitation of this important national resource. Here, as would not generally be true, there is a massive body of claims located in one area, pertaining to one mineral, and known to have been almost entirely cancelled in the proceedings that led to *Virginia-Colorado*. After more than twenty-five years had passed and less than two percent of the claims had been reduced to patent (74,000 out of over 4,000,000 acres embraced by the old claims) it became imperative to seek new means of development. Obviously, the task of clearing out the old claims to prepare for the future will be considerably aided if the Secretary is able to attach some significance to the history of cancellation and subsequent neglect.[1] Under the holding of the court below, he cannot.

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[1] Again, we do not contend that this Court properly could pass at this time on the Secretary's conclusion in the cases before him that laches now barred the claimants seeking patent. In seeking review, and ultimately reversal, of the court below, we only point out that its conclusion automatically forecloses any laches argument, yet the long period of neglect which has in fact ensued as to virtually all the cancelled oil shale claims is plainly a factor distinguishing them from those involved in *Virginia-Colorado*. If, but only if, the argument is available to the Secretary, the burden could be put on any claimant to show actual reliance on the Secretary's former administrative interpretation of *Virginia-Colorado* or other good cause for the period of neglect.

3. Similarly, respondents The Oil Shale Corporation, *et al.* and Brown, *et al.*, correctly observe that the government does not seek reconsideration of *Wilbur* v. *Krushnic*, 280 U.S. 306, a case on which the *Virginia-Colorado* court heavily relied. But in *Wilbur*, the government had taken no specific steps to assert its interest in the claims it cancelled for failure to do assessment work; it relied purely and simply on that failure as working a forfeiture of the claims. In this respect, *Wilbur* is like the other cases relied upon by this Court in *Virginia-Colorado* for the proposition that the government lacked interest in the performance of assessment work[2]—it was a case in

[2] Although this proposition is embodied in the Department's regulations, 43 C.F.R. 3420.4, prior to *Virginia-Colorado* it appeared there in a limiting context which makes inappropriate the broad meaning respondents seek to attach to it. It appeared in the regulations dealing with "Procedure to Obtain Patent to Mineral Lands," 37 L.D. 763, as part of an explanation of the steps required to obtain patent. One of the requirements was that the applicant show that he had a "possessory right to the premises * * * in virtue of a compliance * * * [with state and local law] and with the mining laws of Congress." 37 L.D. at 766. In stating thereafter that the annual assessment work is "solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts," 37 L.D. 769, the regulation sought to assure the applicant for patent that even if he had not done assessment work for one or more years prior to his application, his possessory right under the mining laws of Congress was not automatically forfeit; another claimant must have filed a claim during the period of lapse in order to divest him. In so stating, it in no way indicated that the government itself could not initiate contest proceedings, as it did here, when the assessment work was not done, private top-filing was no longer possible, and the land was needed for a public purpose.

which the government's interest was purely abstract. In *Virginia-Colorado,* and in the cancellations here, the government had taken specific steps (such as posting the property) to assert its interest with respect to the claims—acting as if it were a private prospector "top filing" over a claim on which assessment work had not been done—because under the 1920 statute private top filing was no longer possible and it was deemed important that the land be freed of the old claims.

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1969.

APPENDIX A

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9582

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

JOSEPH B. UMPLEBY AND WASATCH DEVELOPMENT CO., APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX B

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Appeal from the United States District Court for the District of Colorado

9583

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

BARNETTE T. NAPIER, GRACE A. SAVAGE, JOAN L. SAVAGE, MAUDE B. FARNUM, ST. CLAIR NAPIER CATLIN, WILLIAM H. FARNUM, JR., JOHN R. FARNUM, JOHN W. SAVAGE AND NEIL S. MINCER, APPELLEES

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER,
Clerk.

By GLADYS E. HOBBS,
Deputy Clerk.

APPENDIX C

JANUARY TERM, FEBRUARY 4TH, 1969

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth

Appeal from the United States District Court for the District of Colorado

9584

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLANT

v.

PENELOPE CHASE BROWN, INDIVIDUALLY AND AS TRUSTEE, AND THE OIL SHALE CORPORATION, APPELLEE

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

WILLIAM L. WHITTAKER, *Clerk.*
By Gladys E. Hobbs,
Deputy Clerk.

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